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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY ROBERT FOSTER, Defendant and Appellant.	B290953 (Los Angeles County Super. Ct. No. NA052018)

APPEAL from an order of the Superior Court of Los Angeles County. William C. Ryan, Judge. Affirmed with directions.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

Johnny Foster appeals from the denial of his petition for recall of his third strike sentence for possession of a sharp instrument while confined in county jail. Because Foster was armed with a deadly weapon in the commission of the offense, he is ineligible for recall of his sentence under the Three Strikes Reform Act of 2012 (Proposition 36). Therefore, we affirm the order of denial.

Procedural Background

Foster was in county jail awaiting trial for gang-related murders and robberies when deputies found a jailhouse shank hidden in his possession. Shanks were also found on Foster's three cellmates, all of whom were from the same gang as Foster. The People filed an information charging Foster with possession of the shank in violation of Penal Code section 4502.[1] Trial of the charge for possession of the shank was consolidated with his existing charges for the gang-related crimes, and Foster was convicted by a jury on all counts.[2] Because he had prior qualifying strikes, Foster was sentenced to 25 years to life on the shank possession conviction along with several life terms for the gang-related convictions under the Three Strikes Law.

On appeal, this court reversed Foster's convictions for the gang-related murders and robberies, but affirmed the conviction for possession of the shank. On remand, Foster pleaded no contest to voluntary manslaughter with a gang allegation. He received an 11-year sentence plus a 10-year gang enhancement.

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[1] All further section references are to the Penal Code.

[2] Foster was convicted of first degree murder (count 1), three counts of attempted murder (counts 2–4), four counts of robbery (counts 5–8), and possession of a weapon in jail (count 9).

In November 2012, Proposition 36 was passed by the voters to allow an inmate serving a third strike sentence to petition for recall of his sentence and be resentenced as a second strike offender if he met certain conditions. (§ 1170.126, subd. (e); *People v. Superior Court (Kaulick*) (2013) 215 Cal.App.4th 1279, 1285–1286.) On November 5, 2014, Foster filed a petition for recall of his third strike sentence pursuant to Proposition 36. The court issued an order to show cause why the petition should not be granted. The People opposed, contending Foster was armed with a deadly weapon in the commission of the offense, which rendered him ineligible for resentencing under Proposition 36. After an evidentiary hearing, the trial court denied the petition, finding beyond a reasonable doubt that Foster was armed with a deadly weapon in the commission of the offense. The trial court reasoned the shank was available for use by Foster because it was found in his possession. The court also found the shank was "an inherently deadly weapon because it was designed or manufactured to inflict death or great bodily injury." Foster timely appealed.

DISCUSSION

In this appeal, Foster attempts to turn the tide of caselaw holding that a crime such as his—one which involves being armed with a deadly weapon as an element of the crime rather than as an enhancement tethered to a separate underlying felony—renders him ineligible for recall of sentence under Proposition 36. We decline to do so.

I. Recall of Sentence Under Proposition 36

Under the original version of the Three Strikes law, a repeat offender with two or more prior strikes was subject to an indeterminate life sentence if convicted of any new felony.

(*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167–168.) Proposition 36 amended the Penal Code to limit indeterminate life sentences to those repeat offenders whose current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, such a recidivist will be sentenced as a second strike offender. (§§ 667, 1170.12, 1170.126, subd. (e)(2).)

Section 1170.126, subdivision (e)(2), specifies that a defendant is eligible for resentencing as a second strike offender if his current sentence was not imposed for any of the offenses listed in section 667, subdivisions (e)(2)(C)(i)–(iii), and section 1170.12, subdivisions (c)(2)(C)(i)–(iii). A defendant is disqualified from recall of sentence under subdivision (iii)[3] if, "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) A defendant will be considered armed with a deadly weapon if the weapon was available for use, either offensively or defensively. In other words, he is armed if the weapon was under his immediate dominion and control. (*People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*); *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*) disapproved on another ground in *People v. Frierson* (2017) 4 Cal.5th 225, 240, fn. 8; *People v. White* (2014) 223 Cal.App.4th 512, 524 (*White*).) However, a deadly weapon "can be under a person's dominion and control without it being

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[3] Because we are concerned in this opinion primarily with sections 667, subdivision (e)(2)(C)(iii) and 1170.12, subdivision (c)(2)(C)(iii), which contain identical language, we will refer to these statutes collectively as subdivision (iii).

available for use." (*Osuna, supra,* at p. 1030.) Thus, a person's possession of a deadly weapon does not automatically result in his being armed with it. (*Ibid.*; *White, supra,* at p. 524.)

A prisoner who is serving an indeterminate life sentence under the Three Strikes law may petition to have his sentence recalled and be sentenced as a second strike offender if his sentence under Proposition 36 would not have been an indeterminate life sentence. (§ 1170.126, subd. (a).) Upon receiving a petition for recall of sentence, the trial court must determine whether the petitioner is eligible for resentencing and whether resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subd. (f).)

In *Osuna*, the defendant was convicted of being a felon in possession of a firearm. He had seven prior strike convictions and was sentenced to 25 years to life in prison for the firearm possession conviction. (*Osuna, supra*, 225 Cal.App.4th at p. 1027.) He later sought recall of his sentence under Proposition 36. As is the case here, the People asserted the defendant was disqualified from recall and resentencing because he was armed with a firearm during the commission of the crime. The defendant argued there must be an underlying felony to which the firearm possession is " 'tethered' " or to which it has some " 'facilitative nexus' " in order to be disqualified under Proposition 36. (*Id*. at p. 1030.) According to the defendant, one cannot be armed with a firearm during the commission of possession of the same firearm. (*Ibid.*)

The *Osuna* court agreed tethering and a " 'facilitative nexus' " are required when imposing an " 'armed with a firearm' " sentence enhancement under section 12022. (*Osuna, supra,* 225 Cal.App.4th at pp. 1030–1031.) The court explained, "However,

unlike section 12022, which requires that a defendant be armed '*in* the commission of' a felony for additional punishment to be imposed (italics added), the Act disqualifies an inmate from eligibility for lesser punishment if he or she was armed with a firearm '*during* the commission of' the current offense (italics added). 'During' is variously defined as 'throughout the continuance or course of' or 'at some point in the course of.' [Citation.] In other words, it requires a temporal nexus between the arming and the underlying felony, not a facilitative one. The two are not the same. [Citation.]" (*Id.* at p. 1032.) "Since the Act uses the phrase '[d]uring the commission of the current offense,' and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of [Proposition 36] disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm." (*Ibid.*)

In accord with *Osuna* are a number of cases which hold that a defendant who is armed with a firearm or deadly weapon while committing the third strike offense of unlawfully possessing that weapon is ineligible for recall and resentencing under Proposition 36. (*White, supra,* 223 Cal.App.4th at p. 524; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 (*Blakely*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 798 (*Brimmer*); *People v. Hicks* (2014) 231 Cal.App.4th 275, 284 (*Hicks*); *People v. Elder* (2014) 227 Cal.App.4th 1308, 1312–1313 (*Elder*).)

II. Foster's Petition Was Properly Denied

Here, the trial court found beyond a reasonable doubt that Foster was armed with a deadly weapon while committing the

third strike offense. Accordingly, he was ineligible for resentencing under the express provisions of Proposition 36. (§ 1170.126, subd. (e)(2); *Osuna*, *supra,* 225 Cal.App.4th at pp. 1032–1040.) On appeal, Foster does not dispute the trial court's findings support denial of his petition.

Instead, he contends the plain language of the statute and the intent of the electorate suggest the factors listed in subdivision (iii) must attach to the current offense as an addition to and not as an element of the current offense. According to Foster, *Osuna, White, Blakely, Brimmer*, *Hicks*, and *Elder* misinterpreted Proposition 36 to hold otherwise. We are not persuaded.

"We review these questions of statutory construction de novo." (*California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 248.) "In interpreting a voter initiative such as [a proposition], we apply the same principles that govern the construction of a statute. [Citations.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) "[W]e begin by examining the language of the statute (or regulation) itself, giving the words their ordinary and usual meaning. [Citation.] We seek to avoid any interpretation that renders part of the statute ' "meaningless or inoperative" ' or that makes any language mere surplusage. [Citations.] When the language is clear, we apply the language without further inquiry. [Citations.] 'In determining legislative intent, courts look first to the words of the statute itself: if those words have a well-established meaning . . . .there is no need for construction and courts should not indulge in it.' [Citation.] [¶] Only if the language is ambiguous and susceptible of more than one reasonable meaning do we consider 'a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to

be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.' [Citation.]" (*Aleman v. Airtouch Cellular* (2012) 209 Cal.App.4th 556, 568–569.)

Foster sets forth a number of reasons to interpret Proposition 36 to require the arming provision to be tethered to a separate felony. All of these arguments were rejected in *Osuna* and the cases that are in accord with it. We find *Osuna* persuasive and adopt much of its reasoning to affirm the denial of Foster's petition.

Foster first argues the express language in subdivision (iii) shows an offense would only be excluded if something beyond its commission occurs, such as a separate underlying felony. Foster rests his case on the phrase, "during the commission of the current offense . . ." Foster contends this qualifying language—"during the commission of"—only makes sense if there is another offense to which the arming attaches.

Foster further contrasts "during the commission of" in subdivision (iii) with the language in subdivisions (i) and (ii), which both begin with the phrase, "[t]he current offense is . . . ." Foster contends the difference between subdivision (iii) and subdivisions (i) and (ii) demonstrates "[w]here the statute is meant to exclude specific offenses entirely, it so states, but where it is meant to exclude an offense only if something beyond its mere commission occurs, it states 'during the commission of' the offense something else happens."

We decline to parse the statute so finely. It is apparent Proposition 36 was written to exclude from its ambit a specified list of serious or violent felonies, as well as contain a catch-all provision designed to include unenumerated offenses during

which the defendant was armed with a firearm or deadly weapon, among other disqualifying factors. That is what is plainly stated in sections 1170.12, subdivision (c)(2)(C) and 667, subdivision (e)(2)(C). The statute does not require anything more.

Accordingly, we decline to read into the statute a qualifying clause indicating a separate offense must be committed in order for subdivision (iii) to be triggered. The plain language of subdivision (iii) indicates it is triggered if a defendant was armed during the commission of the current offense. As *Osuna* reasoned, "the drafters of the initiative knew how to require a tethering offense or enhancement if desired. (See §§ 667, subd. (e)(2)(C)(i) [disqualifying inmate if current offense is controlled substance charge in which enumerated enhancement allegation was admitted or found true], 1170.12, subd. (c)(2)(C)(i) [same].)" (*Osuna, supra,* 225 Cal.App.4th at p. 1034.) It did not do that with respect to subdivision (iii). "Thus, we believe the electorate intended the disqualifying factors to have a broader reach than defendant's interpretation of the statute would give them." (*Ibid*.)

We also find Foster's attempts to conflate the meanings of "during" and "in" to be unavailing, particularly when Foster relies on www.grammar-quizzes.com for that argument. As discussed extensively in *Osuna,* the words are different and we agree with the analysis in *Osuna* that "during" connotes a temporal connection while "in" connotes a facilitative one. (*Osuna, supra,* 225 Cal.App.4th at p. 1032.) As a result, the plain language of Proposition 36 disqualifies an inmate from recall of his sentence if he is armed with a deadly weapon during the unlawful possession of that weapon.

Additionally, Foster contends the word "armed" is a term of art which means the defendant had access to a weapon to further a crime, regardless of whether it occurred "in" or "during" its commission. He relies on *Bland, supra,* 10 Cal.4th at pages 1000–1003, to support this contention. Foster misreads *Bland*. *Bland* only defined "armed" to mean "if the defendant has the specified weapon available for use, either offensively or defensively." (*Id.* at p. 997.) The *Bland* court then construed the enhancement contained in section 12022, which imposes an additional prison term for anyone " 'armed with a firearm in the commission of' " a felony. (*Bland,* at p. 995.) *Bland* does not stand for the proposition that the word "armed" automatically means the arming must be tethered to an underlying crime.

Foster next urges us to go beyond the plain language of the statute. He contends the electorate could not have intended to subject every violation of section 4502, a low-level offense with one of the lowest possible range of sentences under the law, to an indeterminate term. This argument fails because the plain language of the statute is clear, and there is no reason for us to consider anything other the statute's plain language.

Additionally, it is not the case that a defendant who violates section 4502 does not pose a risk to the public or is not violent, as Foster implies. Shanks or dirks "have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.]" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) A defendant who has carried a concealed dirk or shank in prison would pose a risk to the public if that defendant was released.

III. The Sentences Are to Run Consecutively

Foster alternatively contends the abstract of judgment should be corrected to show that his sentence for possession of a weapon in jail is concurrent with, rather than consecutive to, the voluntary manslaughter sentence. Foster is mistaken; the trial court sentenced him to consecutive terms.

It is undisputed Foster was previously sentenced to consecutive terms for his gang-related convictions and his conviction for possession of a weapon in jail. After this court reversed Foster's gang-related convictions, Foster pleaded no contest to voluntary manslaughter and received a 21-year determinate sentence. At the sentencing hearing, the trial court explained to appellant that his sentence for possession of a weapon in jail would remain as previously imposed and that "nothing will happen to that particular sentence, it stands." The trial court later reiterated, "as to count nine [for possession of a weapon in jail], the court had sentenced defendant to that particular count previously 25 years to life. That particular sentence still stands."

The record demonstrates the trial court intended the sentences to remain consecutive. Thus, the oral pronouncement of sentence comports with the abstract of judgment, which shows that the "[p]reviously imposed sentence of 25 years to life imprisonment stands, [defendant] sentenced to a total of 25 [years] to life + 21 years." This is sufficient to show a consecutive sentence on the abstract of judgment for the voluntary manslaughter conviction.

However, the Attorney General notes that the consecutive "box" is not checked on the abstract of judgment for the possession of a weapon in jail conviction. According to the

Attorney General, this abstract of judgment should be amended by marking the consecutive "box," reflecting that Foster was sentenced consecutively. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [courts may correct clerical errors at any time].)

DISPOSITION

The order denying Foster's petition for recall of sentence under Proposition 36 is affirmed. The abstract of judgment for the possession of a weapon in jail conviction is amended to reflect the consecutive "box" is checked.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.